

STATE OF CALIFORNIA

**Energy Resources
Conservation and Development Commission**

In the Matter of:)	Docket No. 97-AFC-1
)	
Application for Certification)	
for the High Desert Power Project)	
-----)	

**COMMENTS OF COMMISSION STAFF ON THE
PRESIDING MEMBER’S PROPOSED DECISION
FOR THE HIGH DESERT POWER PROJECT**

I. Introduction

On December 15, 1999, the High Desert Power Project Committee (Committee) released the Presiding Member’s Proposed Decision (PMPD) for review and comment. In the PMPD, the Committee recommends that the High Desert Power Project (project) not be approved. Staff concurs with this recommendation and offers the following comments on issues raised in the PMPD.

II. The PMPD Accurately States that the Applicant has Failed to Provide Evidence of Legally Enforceable Rights to All Required Emission Offsets.

Staff notes that the PMPD accurately states that the applicant has failed to provide evidence of purchase or option contracts for the entirety of offsets required for the project. Staff agrees that without such evidence, the Commission should not certify the project. Staff has discussed this matter with the Applicant, and the Applicant has agreed to provide evidence of the

contracts as part of its comments on the PMPD. Staff understands that the only contracts outstanding were the contract to secure offsets from the Southern California Logistics Airport Authority (SCLAA) and the Mojave Desert Air Quality Management District's (District) issues of Emission Reductions Credits (ERCs) for paving of Rancho Road by the City of Adelanto. Staff notes that on December 22, 1999, it received a letter from the District identifying it had received a copy of the option contract to secure ERCs from the SCLAA and that it had granted the ERCs for paving of Rancho Road. When the applicant provides the evidence of the contracts, as noted above, staff will be able to verify that the applicant has evidence of purchase or option contracts for the entirety of offsets required for the project.

III. The PMPD Accurately States that the Applicant has Failed to Provide Evidence of an Aquifer Storage and Recovery Agreement that is Consistent with Staff's Proposed Conditions of Certification.

At the evidentiary hearings held in October 1999, the Applicant introduced a draft Aquifer Storage and Recovery Agreement (Draft Agreement) between the applicant and the Victor Valley Water District (VVWD). (Exh. 133) Staff and the California Department of Fish and Game (CDFG) expressed concerns about several inconsistencies and several conflicts between the Draft Agreement and staff's proposed conditions of certification. Specifically, the Draft Agreement allowed the substitution of water sources not evaluated in the AFC process for use in the HDPP, and allowed VVWD to use project wells for non-project use, which was also not evaluated in the AFC process. In addition, many of the conditions recommended by staff that could potentially affect the Draft Agreement were not included or referenced therein. Staff stated at the hearing that we hoped to be able to resolve these differences in the ensuing weeks.

On December 28, 1999, staff received from Mr. Randy Hill a copy of the Aquifer Storage and Recovery Agreement (Agreement) approved by the VVWD Board

on December 7, 1999. Unfortunately, the Agreement raises the same concerns as the Draft Agreement distributed at the evidentiary hearings. In the transmittal letter, VVWD acknowledges these differences, but states that the Agreement need not be identical with CEC conditions. Rather, "[VVWD] supports[s] the CEC working directly with the HDPP to meet [CEC] conditions." Staff disagrees, and notes that in the PMPD, the Committee stated that "the agreement should not conflict with the final Conditions of Certification imposed by the Commission." (PMPD, page 214) Although staff believes that there is no legal impediment to a Commission license that contains conditions different from those in the Agreement, staff supports the Committee's decision to encourage consistency. Staff has discussed these issues with Mr. Hill. On January 10, 2000 Mr. Hill provided a draft of an amended Agreement, which address these issues. The VVWD Board is schedule to consider the amended Agreement at it meeting on January 18, 2000.

One significant outstanding issue concerns the provision in the Agreement that allows VVWD to use project wells (15). While VVWD representatives stated at the evidentiary hearing that this provision was designed to allow use of the wells only in the event of an emergency, staff and VVWD were unable to reach agreement on terms that limited such use to emergency purposes. (Tr. 10/07/99; pages 276 277; Hill) Instead, VVWD suggested a condition of certification that allowed VVWD unlimited use of project wells, provided that such use was offset by a corresponding reduction in use of wells closer to the Mojave River. As this met staff's objective of ensuring that VVWD use of the wells not cause well production to move closer to the Mojave River than would have occurred without the project (thereby exacerbating drawdown in the alluvial aquifer), staff began to draft such a condition. We worked with VVWD and CDFG, but did not achieve consensus prior to the December 7, 1999 vote of the VVWD Board approving the Agreement. Staff believes that the condition attached to the December 7, 1999 Agreement for inclusion in the Energy

Commission's decision is not sufficient to ensure mitigation of significant adverse impacts on the riparian habitat of the Mojave River.

On January 4, 2000, staff provided to all parties conditions of certification, **Soil&Water 17 and 18**, to address our concerns about VVWD use of project wells. It has been approved by CDFG. In addition, staff has amended **Soil&Water 5** to require a deduction from the project water bank in the amount of any production by VVWD that is not permitted under the condition. We understand that both VVWD and the applicant are agreeable to our proposed conditions. Both revised conditions of certification are appended to these comments.

Staff's conditions differ from those proposed by VVWD in that the baseline is established over five years rather than three years, the reporting requirements are more explicit, no addition to the baseline is allowed from production in excess of the terms of the condition, and they include a prohibition on amendment of the contract. The baseline is extended because we believe that a longer baseline will provide more protection against variations in production in individual years. The reporting requirement clarifications do not represent a difference of opinion, but more clearly state the nature and the timing of various submittals. The baseline provision is needed to ensure that production by VVWD in excess of the amount permitted under the condition does not increase the amount of production that is allowable in the future. The prohibition on amendments is limited to those terms of the contract that have the potential to create an environmental effect, and is necessary to make sure that no conflicts develop between the Energy Commission's decision and the Agreement.

In addition, staff has amended **Soil&Water 5** to require a deduction from the project water bank in the amount of any production by VVWD that is not permitted under the condition. As the Committee is aware, the Commission has no jurisdiction over VVWD, and hence could not take action against VVWD

for any violation of the condition. Thus, absent some other provision in the contract, the only enforcement action the Commission can take in the event that VVWD fails to meet the requirements of the condition is a shutdown of the project or fining the owner. Staff believes it makes sense to provide an alternative to shutdown and fines that also prevents the adverse impact that would otherwise result from occurring. This amendment to **Soil&Water 5** accomplishes that goal. We understand that VVWD and the applicant are agreeable to both amendments, are included in the amended Agreement.

A second issue associated with the Agreement is the provision allowing the use of substitute water for the project. (See ¶11.4 and 14) These provisions are in conflict with the conditions included in the PMPD. **Soil&Water 1** explicitly prohibits the project from using water that is not either provided directly from the SWP or from the project bank. Notwithstanding the applicant's statements that the Energy Commission's conditions would prevail over conflicting provisions in the contract, staff sees no reason for the Energy Commission to rely on a contract that contains such a provision. We understand that VVWD and the applicant have deleted this provision in the amended Agreement.

A third issue is the schedule discussed in ¶3 of the Agreement. ¶3.2 states that a schedule will be jointly developed by HDPP and VVWD for design and construction of the project wells. Staff expressed concern at the hearings that the schedule should explicitly incorporate the testing required by **Soil&Water 8**. We continue to believe that the Agreement should expressly reference the testing requirements of **Soil&Water 8**, as they may affect the timing of other obligations under the contract. We understand that VVWD and the applicant have included such a provision in the amended Agreement.

A fourth issue concerns the injection schedule discussed in ¶8 of the Agreement. The schedule in that section differs materially from the one in the PMPD. Specifically, the agreement: 1) requires injection of 13,000 acre feet of

SWP "as expeditiously as possible"; 2) permits extraction prior to the injection of 13,000 acre feet if the extraction meets the terms of the Agreement; 3) requires replacement of stored water as soon as is reasonably practicable; and 5) allows VVWD to use the project facilities to recharge the groundwater basin. In contrast, **Soil&Water 4** requires injection of 1,000 acre feet within twelve months of commencement of commercial operation; **Soil&Water 6** only requires injection of 13,000 acre feet by the end of the fifth year of commercial operation. In addition, **Soil&Water 7** requires replacement as soon as SWP water is available for sale by MWA, and **Soil&Water 5** establish the mechanism by which the available balance of banked water is determined.

Staff is indifferent as to whether the Agreement should incorporate the injection schedule in the Energy Commission conditions by reference, or simply restate them. However, we believe that the Agreement should explicitly adopt the schedule imposed by the Energy Commission. Although this issue appears similar to that surrounding the use of substitute water, we believe it is in fact more important. This is because although the use of substitute water may never be proposed by VVWD, it is indisputable that some schedule for injection must be followed. We believe the Agreement should reflect the schedule contained in the PMPD, not another schedule that has no effect. VVWD and the applicant have agreed to this change in the amend Agreement.

A fifth concern staff notes with respect to the Agreement is that although it references a "positive water storage balance" (¶11.2), it contains no discussion about how to calculate that balance. At the evidentiary hearing, VVWD witness Hill stated that the balance would be calculated under the terms of the storage agreement with the Mojave Water Agency. (Tr.10/07/99; Page 269; Hill) Staff believes that because maintaining a positive balance is critical to ensuring the effectiveness of the mitigation measure, the Agreement should simply

reference the Energy Commission's proposed conditions. VVWD and the applicant have agreed to this change in the amended Agreement.

Another difference between the PMPD and the Agreement inconsistency is found in 12. This section allows the use of banked water only in the event of a service disruption on the SWP or MWA system. Staff did not recommend inclusion of such a condition in its testimony and does not believe that it is necessary to prevent any potential environmental effects. However, we do not believe it presents a conflict with the PMPD and hence are indifferent as to whether it remains in the Agreement.

IV. Staff's Recommendations are not Based on a "Worst-case" Analysis

The PMPD states that the modeling regime used by staff to assess the project's potential impacts "employed conservative "worst-case" assumptions." (PMPD, page 209). This is not an accurate statement. As discussed in the FSA, only the project operation assumptions in the analysis were "worst-case" assumptions. (Exh. 131, page 30) The groundwater system parameters are based on the best available information. In addition, the sensitivity testing conducted by staff indicated that at least one of the parameters —hydraulic conductivity — is likely to be higher than that used in the base case, which could, in turn, double the estimated impact identified for the base case. (Exh. 131, page 46) This is the reason that staff has recommended site-specific testing be done to establish the actual parameters that will be used to calculate the available balance. Staff recommends that the Committee delete the reference to "worst-case" assumptions in any revised PMPD that it issues.

V. The Cultural Resources Section of the PMPD should be Modified to Reflect Recent Changes in the CEQA Guidelines Directing Lead Agencies to Assess Whether Cultural Resources are also Historical Resources.

Staff notes that the Cultural Resources section of the PMPD does not contain a discussion of the new CEQA guidelines directing lead agencies to categorize various types of cultural resources. There is a discussion of these requirements in the Final Staff Assessment; we summarize them here, and recommend that the PMPD be modified to incorporate a discussion of this issue.

Prior to the recent amendments to the CEQA guidelines, the bulk of the information on how to assess cultural resources was contained in Appendix K. Much of the language of that appendix has now been incorporated into Title 14, Code of California Regulations (CCR), sections 15126.4 and 15064.5. In addition, these sections now explicitly require lead agencies to make a determination of whether a proposed project will affect historic resources and sets forth a listing of criteria for making this determination. As used in the law, the term historic resources includes any resource, regardless of age, as long as it meets these criteria. If the criteria are met, the lead agency must evaluate whether the project will cause a substantial adverse change in the significance of that historic resource, which the regulations state is a significant effect on the environment. The CEQA changes also indicate that the mitigation for impacts to historic resources that meet these criteria shall not be subject to the limitations provided in PRC section 21083.2.

Using the above criteria, staff determined that all of the cultural resource sites described in the AFC and in subsequent filings for the HDPP project meet one or more of the criteria for being an historical resource. Because of this determination, we believe that the prohibition contained in PRC section 21083.2 does not apply to staff's recommended mitigation. Although the Energy Commission's site certification program has been certified by the Secretary of the Resources Agency pursuant to PRC section 21080.5, and hence is arguably not subject to the requirements in the CEQA guidelines, we

believe it would nonetheless be prudent to include a discussion of these recent amendments and their effect on this project in the PMPD.

VI. The Discussion of Biological Resources Mitigation Requirements Should be Clarified.

The PMPD lists two amounts associated with overall habitat compensation costs. In the text, it states that these costs "could be as much as \$1,722,051." (PMPD, page 136) Bio-7 references the establishment of a form of security in the amount of \$1,553,819.00. However, the reason for this discrepancy is not clearly stated. To clarify this issue, staff used the higher number in its original Bio-7, but adjusted it downward, just prior to the CEC hearings on the FSA, when BLM indicated that any habitat compensation attributable to losses on federal land would have to be in the form of a payment to the federal government. Prior to this revelation, CEC staff and CDFG understood that all parties agreed that habitat compensation would go to the state or a well established third party nonprofit conservation organization, such as the Desert Tortoise Preserve Committee. However, Staff and CDFG are concerned that payment to the federal government constitutes mitigation of impacts caused by the project, and thus, have not required it as part of the proposed mitigation required under condition of certification Bio-7. Consequently, BLM is likely to require that the Applicant pay approximately \$220,000 as mitigation of impact to federal lands as a condition of the right-of-way grant, that is not reflected in staff's conditions of certification.

VII. The PMPD should Incorporate the Following Minor Changes.

On the sixth line on page 46, "exhaust sacks" should be changed to "exhaust stacks". In the second sentence on page 50, the first "the" should be deleted. On pages 84 and 85, there are four instances where requirements "1a through 1f" should be changed to "1a through 1h". On page 224 of the PMPD, under the

heading Dry Cooling, the word "condensed" in the second sentence should be changed to "condenses".

PMPD page 248, Condition VIS-2: The second sentence, which starts with At least thirty (30) days, should be part of the Protocol instead of preceding the Protocol.

PMPD page 250, Condition VIS-5: Under Protocol, the third bulleted item, which begins with The project owner shall not begin construction, should be a separate item instead of a bulleted item.

Dated: January 13, 2000

Respectfully submitted,

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Proposed Errata and New Soil and Water Conditions of Certification 97-AFC-2

Soil & Water 5 (a) The amount of banked groundwater available to the project **during** the first twelve (12) months of commercial operation is the amount of SWP water injected by the project owner into the High Desert Power Project (HDPP) (project) wells minus the amount of groundwater pumped by the project owner, minus the amount of dissipated groundwater. The amount of banked groundwater available to the project **after** the first twelve (12) months of commercial operation is the amount of SWP water injected by the project owner into the HDPP project wells, minus the amount of dissipated groundwater, minus one thousand (1,000) acre feet.

(b) The amount of banked groundwater available to the project shall be calculated by the CEC staff using the HDPP model, FEMFLOW3D. The amount of banked groundwater available shall be updated on a calendar basis by the CEC staff, taking into account the amount of groundwater pumped by the project during the preceding year and the amount of water banked by the project during the preceding year.

(c) When calculating the amount of banked groundwater available to the project, CEC staff shall subtract any amount of water that is produced by Victor Valley Water District (VVWD) from the project wells for purposes other than use by the project that exceeds the baseline, as defined in **Soil&Water-17(1)**.

(d) Each annual model run shall simulate the . . . ***(the rest is unchanged)***

Soil & Water 17 The project owner shall enter into an Aquifer Storage and Recovery Agreement with the Victor Valley Water District (VVWD). This agreement shall contain the following conditions:

(1) It shall prohibit VVWD from producing or allowing others to produce water from project wells, except that VVWD may produce water from project wells: (i) for use by the HDPP project pursuant to Soil & Water 1; and (ii) for purposes other than use by the HDPP project pursuant to Soil & Water 1 provided that such production, in combination with production from the VVWD wells identified in "c" below does not exceed the amount identified as "the baseline", as defined in a below.

a. The contract shall define the baseline as the average aggregated annual production of the wells identified in "c" during the immediately preceding five years. The contract shall state that

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any water produced by VVWD pursuant to (ii) above shall be included in subsequent calculations of the baseline only if that production does not exceed the baseline for the calendar year in which the production occurs, as required by this condition.

- b. The contract shall require VVWD to establish the first baseline using the five calendar years preceding the operation of the project wells, and shall re-calculate the baseline on a calendar year basis by January 15 of each year.
- c. The contract shall state that "wells identified in "c" means VVWD wells that are located in a corridor two to two and one half miles wide adjacent to and west of the river s western bank including all wells within the following land sections:
 - Within Township 6 North, Range 4 West, sections 31, 32, 33, and 34.
 - Within Township 5 North, Range 4 West, sections 4, 5, the east of 8, 9, 10, 15, 16, the east of 21, 22, 23, 25, 26, 27, the east of 28, the east of 33, 34, 35, and 36.

(2) It shall state that the project owner shall provide to the CEC CPM and CDFG on a quarterly basis a monthly accounting of 1) all water pumped from project wells that is supplied to the project owner, and 2) water pumped from project wells that is supplied to VVWD

(3) It shall state that VVWD shall provide to the CEC CPM and CDFG a baseline calculation no later than January 15 of each year.

The contract may include terms that require VVWD to compensate HDPP for any costs associated with subtractions from the amount of banked groundwater available to HDPP under the terms of Soil&Water-5(c). Any amendments to this agreement shall be approved by the CEC CPM 30 days prior to the effective date of the amendment.

Verification: The project owner shall provide to the CEC CPM and CDFG a copy of a signed Aquifer Storage and Recovery Agreement with the terms described above prior to certification of the project. Any amendments to this agreement shall be approved by the CEC CPM 30 days prior to the effective date of the amendment.

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Soil & Water 18 The project owner shall ensure that flow meters are installed on project wells such that the total amount of water injected and produced on a monthly basis can be determined. In addition, the project owner shall ensure that separate flow meters are installed on 1) that portion of the water delivery system that is dedicated to providing water to the project owner; and 2) on that portion of the water delivery system that will be used to provide water to VVWD pursuant to Soil & Water 17 (2).

Verification: The project owner shall provide to the CEC CPM and CDFG on a quarterly basis a monthly accounting of 1) all groundwater injected into project wells; 2) water pumped from project wells that is supplied to the project owner, and 3) water pumped from project wells that is supplied to VVWD